

**Before the
Federal Communications Commission
Washington, D.C. 20554**

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In the Matter of)	
)	
Implementation of the Telecommunications)	CC Docket No. 96-115
Act of 1996:)	
)	
Telecommunications Carriers' Use of)	
Customer Propriety Network Information)	
And Other Customer Information;)	
)	
Implementation of the Non-Accounting)	CC Docket No. 96-149
Safeguards of Sections 271 and 272 of the)	
Communications Act of 1934, As Amended)	
)	
2000 Biennial Regulatory Review --)	
Review, of Policies and Rules Concerning)	CC Docket No. 00-257
Unauthorized Changes of Consumers')	
Long Distance Carriers)	

REPLY

America Online, Inc. ("AOL"), pursuant to Section 1.429(g) of the FCC rules, 47 C.F.R. §1.429(g), files this reply to the submissions of AT&T, Verizon and Qwest¹ regarding AOL's *Petition for Reconsideration* of October 21, 2002 (the "AOL Petition"). **As** set forth in the AOL Petition and explained herein, AOL continues to urge the Commission to reconsider the Third Report and Order and Third Further Notice of Proposed Rulemaking.²

The AOL Petition argued for reconsideration of three aspects of the *Third R&O* that significantly affect whether the Federal Communications Commission's ("FCC's") customer

¹ Comments of AT&T Corp on Petitions for Reconsideration, at 14-17 (filed Dec. 20, 2002) ("AT&T Comments"); Verizon's Comments to Petitions for Reconsideration of Third Report and Order, at 4-7 (filed Dec. 26, 2002) ("Verizon Opposition"); Support and Opposition of Qwest Services Corp. at 10-14 (filed Dec. 26, 2002) ("Qwest Opposition").

² Third Report and Order and Third Further Notice of Proposed Rulemaking, 17 FCC Rcd. 14860 (2000) ("*Third R&O*")

proprietary network information (“CPNI”)³ rules will continue to promote a competitive marketplace for information services, including Internet services, or whether they will skew competition in favor of carrier-affiliated information services to the detriment of the public interest

First, AOL explained that while the *Third R&O* provided carriers with additional rights to market all “communications-related services” including “information services typically provided by telecommunications carriers,”⁴ the Commission unlawfully failed to explain why it reversed its conclusions in the *Order on Reconsideration* regarding reasonable consumer expectations as to the use of their CPNI or to delineate how the public interest would be served by this substantial shift in position.’ Similarly, while the *Order on Reconsideration* expressly balanced the costs to Internet Service Provider (“ISP”) competition if carriers were permitted under law to misuse CPNI,⁶ the *Third K&O* tips in favor of carrier-affiliated ISPs without addressing this prior precedent

³ In this reply, AOL refers specifically to CPNI as defined in Section 222(f)(1) of the Communications Act. 47 U.S.C. § 222(f)(1).

⁴ 47 C.F.R. § 64.2003(b) (“The term ‘communications-related services’ means telecommunications services, information services typically provided by telecommunications carriers, and services related to the provision or maintenance of customer premises equipment.”).

⁵ In the Matter of Implementation of the Telecommunications Act of 1996, et al., *Order on Reconsideration and Petitions for Forbearance*, 14 FCC Rcd. 14409, ¶ 29 (1999) (“*Order on Reconsideration*”) (“there is no evidence, currently, that consumers expect to receive such services from their wireline provider, or that they expect to use such services in the way that they expect to receive or use more integrated services.”).

⁶ “The ability to use CPNI from an existing service relationship to market new services to a customer bestows an enormous competitive advantage for those carriers that currently have a service relationship with customers, particularly incumbent exchange carriers This, in turn, poses a significant risk to the development of competition Because of the competitive advantage that many BOCs retain, we concluded that we would not remove certain safeguards designed to protect against BOC discrimination despite the competitive ISP marketplace. We reach a similar conclusion here: giving wireline carriers, particularly ILECs, the right to use

Second, AOL demonstrated that the *Third R&O* inappropriately allowed third-party joint venturers of carriers to access and use CPNI. Not only does this encourage carriers to discriminate in their selection of favored ISPs, but it also is unsound because the Commission has no jurisdiction to control these non-carrier third parties or any abuses of CPNI that they might engage in. Moreover, the adoption of the “joint venturer” exception to third party access to CPNI is open-ended and was conceived of without public input; as such, this rule change is procedurally defective.⁷

Third, the AOL Petition explained that the *Third R&O* failed to adopt safeguards against abuse of CPNI when ISPs and other information service providers order incumbent local exchange carrier (“ILEC”) services for their end-users. In this situation, the premise of the *Third R&O* – that the end-user would be in a position to consent to the ILEC’s use of the CPNI – is flawed. Either the ISP is the ILEC’s customer with CPNI rights (*e.g.*, when the ISP purchases “wholesale” DSL from the ILEC) or the end-user customer has only provided information to the ISP and not to the ILEC (*e.g.*, when a customer orders voicemail service from the ISP and the ISP acts as agent for the customer to order the ILEC’s “call forwarding/busy don’t answer” for the end user’s phone line). At a minimum, the Commission must address on reconsideration these potential abuses of CPNI that could materially impact the delivery of high-speed Internet and other information services to Americans.

Notably, the comments and oppositions do not significantly contest the points raised in the AOL Petition. Indeed, AT&T fully supports the AOL Petition position that the proprietary

CPNI without affirmative customer approval to market Internet access services could damage the competitive Internet access market at this point in time.” *Id.*, ¶ 55.

⁷ *MCI Telecommunications Corp. v. FCC*, 57 F.3d 1136, 1140-43 (D.C. Cir. 1995) (*FCC’s* final order is vacated where final rule was not a “logical outgrowth” of its notice for comment in violation of APA obligations under 5 U.S.C. § 553(b)).

information of the unaffiliated ISPs and their customers should not be used by the ILECs or the ILECs' joint venturers. AT&T Comments at 16. As AT&T points out, ILEC use of CPNI in such a manner is an unreasonable practice prohibited by Section 201(b) of the Act, and is contrary to the spirit, if not the letter, of the Section 222(b) prohibition on use of proprietary information for marketing. *Id.* Even Verizon admits that, under prior FCC precedent, ISPs ordering services from an ILEC "are customers of the carrier, and can limit the carriers' access to their CPNI." Verizon Opposition at 7. While AOL agrees wholeheartedly with Verizon that ISP proprietary information *should be* protected, the FCC has determined that the Section 222 CPNI rules "fully supplant[]" the *Computer III* CPNI rules.⁸ Thus, because ISPs derive rights under Section 222 of the Act and no longer under *Computer III* precedent, the FCC must address these critical issues on reconsideration of the *Third R&O*

Contrary to the broad statements of Qwest and Verizon, the AOL Petition does not argue that carriers should be precluded from use of all CPNI to market information services.⁹ When the *Third R&O* replaced the prior limits set forth in the *Order on Reconsideration*, however, the Commission wholly failed to reconcile its new position with its prior analysis regarding customer expectations and the effects on the ISP market

⁸ *In the Matter of Implementation of the Telecommunications Act of 1996, et al., Second Report and Order*, 13 FCC Rcd. 8061, ¶ 193 (1998) ("Insofar as the statutory scheme we implement in this order fully supplants our Computer III CPNI framework, we are further persuaded that we should likewise not retain the CPNI safeguards designed to ensure compliance within the Computer III framework. The record nonetheless supports the need to specify safeguards to prevent unapproved use, disclosure, and access to customer CPNI by carrier personnel and unaffiliated entities under the new scheme.").

⁹ Similarly, the attempts of Verizon and Qwest to avert attention from the CPNI legal and policy arguments raised by the AOL Petition by characterizing AOL's privacy policies are unavailing. Unlike these carriers, AOL is not a carrier and is not subject to Section 222. Further, unlike AOL, Verizon and Qwest provide essential telecommunications inputs to ISP competitors and, absent appropriate regulation, have the opportunity and incentive to abuse their competitive CPNI

Qwest claims that the “constitutional imperatives” of the Tenth Circuit’s *US West* decision” and the court’s “clear skepticism regarding the ‘competition-protection’ aspects of Section 222” excuse the Commission in the **Third R&O** from the obligation to explain the rule change in plain language. Qwest Opposition at 12. The *US West* decision, however, did not invalidate the Commission’s concerns for the promotion of competition and, indeed, the court accepted those government objectives “in concert with the government’s interest in protecting consumer privacy.”¹¹ In the context of carrier win-back, the **Third R&O** (§ 134) expressly “balance[d] concerns regarding the proper use of CPNI with the goals of promoting competition in the marketplace”

Moreover, as for asserted constitutional claims, the court did *not* overturn the Commission’s factual findings regarding customer expectations for marketing of ISP services or the impact of carrier use of CPNI on the related ISP areas. While the Commission certainly has the latitude to alter its direction, APA precedent requires the agency to provide notice and an opportunity to comment on proposed rule changes and to explain its departure from previous decisions.¹²

Further, Qwest and Verizon offer, at best, weak support for the **Third R&O**’s “joint venturer” exception to the rule against carrier disclosure of CPNI.¹³ Verizon claims that AOL’s objection is “misplaced” without further explanation, Verizon Opposition at 7, and Qwest simply states that no CPNI abuse will occur because “carriers know when they are in sales and

¹⁰ *U.S. WEST, Inc. v. FCC*, 182 F.3d 1224 (10th Cir. 1999), *cert. denied*, 530 U.S. 1213 (2000).

¹¹ *Id.*, 1237.

¹² *Greater Boston Television Corp. v. FCC*, 444 F. 2d 841, 851-852 (1970); *MCI Telecommunications Corp. v. FCC*, 57 F. 3d 1136, 1140-1143 (1995).

¹³ AT&T argues that the potential for abuse is not significant, but in any event that only IXCs should not be restricted in their use of CPNI.

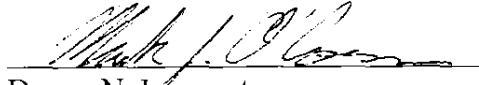
marketing relationships with others.” Qwest Opposition at 13. These carriers have offered no support that CPNI would be protected, that effective enforcement action could be taken to prevent ongoing misuse, *or* that carriers would be in control of the flow of CPNI *to* the third party. Moreover, these parties entirely fail to explain how a carrier practice of sharing CPNI with one third party but not other similarly situated entities (for example, if Qwest were to share DSL ordering information with Microsoft but not with other ISPs) is not an unreasonable and discriminatory practice in violation of Section 202(b) of the Act. Finally, Qwest contends that ordering information submitted by an ISP on behalf of the ISP’s end user may be the ILEC’s “customer service record” information, and not CPNI, subject to *any* Section 222 protections Qwest Opposition at 13-14. Qwest’s comments underscore the need for explicit rules protecting competitively sensitive CPNI provided by ISPs.

CONCLUSION

For the reasons stated above, AOL urges the Commission to reconsider the ***Third R&O*** to ensure that wireline carriers, especially incumbent LECs, do not misuse CPNI of unaffiliated ISPs and their customers to impair the vibrant market for information services.

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Certificate of Service

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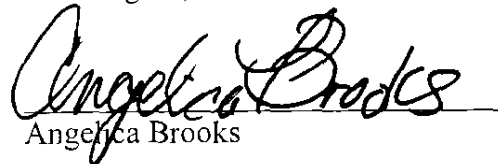
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